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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1177

THE FLUOR CORPORATION, LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY and MOSHER STEEL COMPANY.

Respondents.

Reply Brief Of Petitioners, The Fluor Corporation, Ltd. And The Sureties

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Respondent Mosher Steel Company's Response[1] for the first time raises the argument (Resp. Br. page 9) that the position of these petitioners is that ". . . somehow Mosher was not a materialman".

[1] Mosher filed a joint Response to three separate petitions for certiorari filed respectively by: The Fluor Corporation, Ltd., the prime contractor and the sureties on its Miller Act Bond; Union Tank Car Company, first-tier subcontractor; and Ward Industries Corporation, the surviving member of IMI-Ward second-tier subcontractor.

This argument demonstrates a total lack of comprehension of the position of these petitioners, or more likely, an effort to evade the issue by begging the question. The primary question presented for review (Petition p. 2) is as follows:

> "1. Is a prime contractor liable under the Miller Act to a materialman of a second-tier subcontractor because the first-tier subcontractor guaranteed payment to the materialman; or, in other words, is a mere promise of payment, by a subcontractor to a person not otherwise entitled to recover under the Act, a 'direct contractual relationship with a subcontractor' within the meaning of 40 U.S.C. §270(b)?"

Respondent's assertion to the contrary, our petition states and the record is clear that Mosher *was* a materialman to IMI-Ward, the second-tier subcontractor. For this reason, under *MacEvoy*[2] and many other cases, Mosher is not entitled to recover under the Miller Act.

Mosher makes no effort to discuss this question, from which this Court can only conclude that it concedes our contention[3] that the Congress intended that the Miller Act should extend only to persons *entitled to payment as materialmen, laborers or subcontractors,* and not to remote or collateral relationships.

Since Mosher claims its right to payment from Fluor, not as a materialman, but as the beneficiary of a promise of guaranty from Union, the second-tier subcontractor, it is not under the Act, and not entitled to

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[2] *Clifford F. MacEvoy v. U.S.* (1944) 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163.

[3] Petition, 8, 9.

recover against the prime contractor and its sureties.

Nor does Mosher's discussion of the other questions presented by our petition assist the Court. Mosher does not even discuss the due process question, and fails to deal with the fact that the decision sought to be reviewed conflicts squarely with *Millers' National Ins. Co. v. Wichita Flour M. Co.*, 257 F.2d 93 (C.A. 10, 1958). These latter questions involve interest, and are dependent upon the primary question discussed above.

CONCLUSION

For the reasons stated herein and in their petition, the Fluor Corporation and the sureties respectfully pray that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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